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Before The
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter Of	)	
Closed Captioning And Video Description Of Video Programming	)	
	)	**MM Docket No. 95-176**
Implementation Of Section 305 Of The Telecommunications Act Of 1996	)	
Video Programming Accessibility	)	

PETITION OF GAME SHOW NETWORK, L.P. FOR RECONSIDERATION

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Dated: October 16, 1997

SUMMARY

Game Show Network, L.P. ("GSN") urges the Commission to reconsider parts of its *Report and Order* on closed captioning. Although the current rules make significant progress towards achieving the congressional intent behind the closed captioning requirements, the Commission should revise its rules in light of the special needs of startup networks. As they currently stand, the Commission's rules could result in **fewer** cable channels carrying **less** captioned programming – a result intended by neither Congress nor the Commission.

The current new network exemption – exempting a network from captioning for its first four years after launch – is unrelated to a network's financial status. While some networks may be successful after a couple years of operation, most networks lose money until reaching at least 20 million viewers. The Commission therefore should exempt all startup networks until they reach that level. By doing so, the Commission will ensure that its requirements will not eliminate new networks before they have a realistic opportunity to compete.

Nevertheless, if the Commission decides to retain its new network exemption in its current form, it should begin the four-year exemption period with the enactment of its regulations rather than a network's launch date. Many startup networks – which rely heavily on older programming -- purchased their programs before Congress required closed captioning. Without an exemption, the additional and unexpected cost of captioning could force some of these networks out of the market altogether.

Similarly, the Commission should toll the phase-in of its captioning requirements during a new network's exemption period. Non-exempt networks have eight and ten

years to implement the Commission's captioning requirements for new and pre-rule programming, respectively. New networks should receive the same amount of time.

The Commission also should amend its revenue exemption standards to reflect the high costs of a national startup network. The current standards are based on the false premise that a network's revenue and its ability to afford captioning are related. But new national networks may have revenue above the Commission's $3 million revenue exemption, yet be years away from breaking even. Similarly, although the Commission has capped captioning spending at 2 percent of a network's revenue, most startup networks cannot afford even this additional cost.

GSN also suggests that the Commission require the captioning of "significantly viewed" library programming and 2 percent of general library programming per year, rather than requiring the captioning of 75 percent of pre-rule shows in ten years. Because new networks emphasize library programming, they will be particularly harmed by a 75 percent captioning requirement – even one postponed for 10 years.

Finally, the Commission should exempt interactive programming from its closed captioning requirements. The Commission failed to respond to GSN's comments describing the effect of captioning on its interactive programming. Instead, the Commission simply suggested that hearing-impaired viewers disable the captioning. This raises the question of why captioning is required for such programming at all.

GSN wishes to assist the Commission in the implementation of its captioning rules. We urge the Commission, however, to reconsider some of its requirements because of their effect on startup networks. By doing so, the Commission will ensure that accessibility does not come at the cost of programming diversity and competition.

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Pursuant to Sections 1.429 and 1.4(b)(1) of the Commission's rules,[1] GAME SHOW NETWORK, L.P. ("GSN") by its attorneys hereby petitions for reconsideration of the *Report and Order*[2] in the above-captioned docket.

INTRODUCTION

Section 713 of the Telecommunications Act of 1996 (the "Act") requires the Commission to adopt rules ensuring that video programming generally be closed captioned.[3] GSN, even though a startup network, has been a strong supporter of the Commission's efforts to increase the amount of closed captioned programming.

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[1] 47 C.F.R. §§1.429, 1.4(b)(1).

[2] Report and Order, *In the Matter of Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility,* FCC No. 97-29, MM Docket No. 95-176, (rel. Aug. 22, 1997), 62 Fed. Reg. 48,487 (Sept. 16, 1997) ("*Report and Order*").

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, § 713, 110 Stat. 6 (codified as amended at 47 U.S.C. § 613 (1996)).

Unfortunately, the *Report and Order* contains several flaws that could jeopardize the financial health of GSN and other startup cable networks, particularly those, such as GSN, that make significant use of pre-rule (or library) programming, *i.e*, programs first aired before January 1, 1998. Congress intended Section 713 to increase the amount of closed-captioned programming. Yet the viewability problems and increased costs generated by the Commission's closed captioning requirements as written may result in **fewer** new networks and **less** closed-captioned programming. GSN therefore urges the Commission on reconsideration to revise its *Report and Order* to address these issues.

First, GSN and several other parties submitted comments urging the Commission to exempt from its closed captioning requirements start-up networks available to fewer than 20 million households. The Commission decided instead to exempt networks only for their first four years of operation, regardless of their size. In rejecting the subscriber-based criteria, the Commission stated that "an exemption based on years that a programming network has been in operation is more relevant than one that incorporates subscriber numbers when applied to different types of networks" such as regional networks. The Commission offered no explanation of how its rule was "more relevant" than a subscriber-based plan, however, and failed to address the high costs of starting a network and the advantages of a subscriber-based exemption. Indeed, the Commission never discussed the possibility of applying a four-year standard only to those regional networks about which it raised specific concerns. We believe a four-year exemption that is not tied to the number of subscribers is of little regulatory value.

Even were the Commission to retain its four-year exemption policy, GSN believes substantial modifications would be in order. The Commission should start the four-year exemption for existing startup networks from the effective date of the captioning regulations, rather than the networks' launch dates. GSN also urges the Commission to toll its transition captioning requirements for new networks during the four-year exemption period, and start the transition period for these startups at the end of their exemption. In addition, the Commission should raise substantially its revenue exemption to reflect the financial realities of new national networks.

Second, to the extent GSN favors **any** numerical standard for closed captioning of pre-rule programming, we recommend a gradual phase-in of closed captioning requirements of 2 percent per year for non-exempt networks, as well as the captioning of "significantly viewed" programs. The Commission rejected this phase-in approach in favor of a 75 percent captioning "cliff" that takes effect ten years after enactment of the captioning rules. Once again, however, the Commission failed to consider the effect of its rule on startup networks.

Because significant types of pre-rule programming are both well-known and relatively inexpensive, they are popular with new networks. As the Commission acknowledged, many such networks, including GSN, had already purchased previously aired programs before the Commission's rules, or indeed Section 713, were contemplated. The Commission's 75 percent rule, however, makes no effort to spare new networks from its effects. As a result, many fledgling networks may fail or cut back on pre-rule programs, resulting in a net loss of programming – a result that Congress explicitly rejected. GSN therefore recommends a phase-in of the captioning requirements at 2 percent per year, in addition to the captioning of "significantly viewed" programs. At a minimum, the 10-year deadline by which pre-rule programming must be captioned should start to run only after the expiration of the exemption period established for startup networks.

Finally, Section 713(d) permits the Commission to exempt "programs, classes of programs, or services" from its closed captioning requirements if those requirements would be "economically burdensome." In its Comments and Reply, GSN proposed a class exemption for interactive programming, given the interference captioning causes to the viewability of such programs. In its *Report and Order,* however, the Commission never addressed GSN's concerns, referring only to the "critical portions" of sports, weather, and shopping programming that "is lost if captioning is absent." The Commission also suggested that users of closed captioning could disable the captioning function if it interfered with other textual or graphical material – an absurd solution, since the goal of Section 713 is to provide closed captioning. The Commission did not in any way address the concerns of GSN that captioning "substantially interferes" with the viewability of interactive programming, or compare the costs of captioning such programming (including loss of content) with its benefits (which are nil, if the beneficiary of closed captioning must turn it off to view the programming).

Congress intended closed captioning to increase the accessibility of video programming for the hearing-impaired, but not at the expense of competition and programming diversity in the cable industry. The Commission should not let its desire for a single uniform rule, applicable to all types of programmers, blind it to the special circumstances of national startup networks like GSN. As one commentator recently wrote:

> Compulsive devotion to uniformity in law can generally be achieved only by infidelity to fairness in life. Justice Cardozo understood our inclination to universal rules, but cautioned that "uniformity of method will carry us upon the rocks" and that "the curse of this fluidity, of an ever-shifting approximation, is one that the law must bear," or "curses yet more dreadful will be invited in exchange."
>
> -- Philip K. Howard, *The Death of Common Sense* at 38 (1994).

The Commission should revise its rules to reflect the financial and technical realities of start-up cable programming, allow for a more liberal phase-in of pre-rule programming, and exempt interactive programming where the captioning substantially interferes with its viewability.

DISCUSSION

I. THE COMMISSION'S CLOSED CAPTIONING RULES UNFAIRLY BURDEN STARTUP NETWORKS.

A. New Networks Should Not Be Required To Closed Caption Their Programming Until They Are Available To At Least 20 Million Viewers.

In its comments, GSN proposed that closed captioning requirements not be imposed on a network until it was available to at least 20 million viewers. GSN Reply at 4-7.[4] Comments from a number of other startup networks observed that it is generally impossible for a new, niche cable television network to break even until its distribution

[4] Although GSN's Reply Comments alternatively recommended exempting networks until five years after startup (Reply at 4), this proposal was premised on the Commission's granting of GSN's other recommendations, such as those relating to interactive programming, and assumed that the rules would go into effect five years after their enactment by the Commission.

level reaches 20 million viewers. *See, e.g.,* Outdoor Network *et al.* Comments at 13; Bloomberg Information Television Comments at 11. *See also Report and Order* ¶ 91; NCTA Reply Comments at 12. The Commission acknowledged that new networks do indeed "face significant start-up costs and . . . the additional costs of captioning could pose an economic burden that might deter entry by some networks." *Report and Order* ¶ 154. Yet it rejected the 20 million subscriber threshold in favor of an exemption for the first four years of a network's operation, calculated from the network's launch date. *Id.* After four years, the network will become subject to the captioning requirements applicable to the rest of the industry at that time, as if no exemption had been in effect. *Id.*

The Commission explained that it rejected the subscriber-based rule because "an exemption based on years that a programming network has been in operation is more relevant than one that incorporates subscriber numbers when applied to a number of different types of networks." *Id.* The Commission singled out regional networks as a concern, stating that "if we were to adopt a 20 million subscriber limit, it is unlikely that any regional network would ever be subject to the rules, yet such networks are intended for smaller subscriber bases and can be successful with far fewer subscribers." *Id.*

Other than its reference to regional networks, the Commission made no attempt to justify its selection of the four-year rule over the subscriber-based alternative. If the commission is concerned about regional networks, however, it should simply impose a separate rule applicable to those entities. There is no reasonable justification for imposing a four-year rule on **all** startup networks. Without a 20 million subscriber base,

national startup networks will not break even and all the Commission's new rules will do is add to their risk of failure.

But even for regional networks, the four-year rule is arbitrary and capricious. Although the Commission promulgated the rule ostensibly to spare new networks from the financial burden of closed captioning, the four-year rule bears no relation to a network's financial health or long-term viability.

As GSN and numerous other parties have explained, new networks have substantial costs and little revenue. *See Report and Order* ¶ 91.[5] Costs include promotional expenses, research, facilities, acquiring and producing programming, personnel, and signal transmission. GSN *Ex Parte* Presentation at 3. In exchange for gaining carriage on multichannel video programming distributors (MVPDs), many new networks are forced to forgo virtually all affiliation revenues for several years. *Id.*; Outdoor Life Network *et al.* Comments at 11. Some new networks have even agreed to **pay** MVPDs in exchange for being launched on their cable systems – so-called "launch fees." *Id.* at 12; GSN *Ex Parte* Presentation at 3.

According to NCTA, launching a new network can cost $100 million or more, and take at least five years to **break even**, let alone earn a positive return. NCTA Comments at 19. And even after breaking even, many networks still incur substantial costs with little revenue from advertising or affiliation fees. NCTA Comments at 19; Outdoor Network *et al.* Comments at 12. As NCTA has stated, even after a new network stops

[5] *See In the Matter of Closed Captioning and Video Description of Video Programming,* MM Docket No. 95-176, *Ex Parte* Presentation of The Game Show Network, L.P. to the Federal Communications Commission (July 1997) at 3-4 ("GSN *Ex Parte* Presentation").

losing money, "it will be many more years . . . before a new network can attract sufficient advertising or subscriber revenues to recoup the initial investment in the service." NCTA Comments at 19.

Indeed, for many existing startup networks, the four-year period contemplated in the Commission's rules will expire shortly. Yet today, most of these networks still struggle to gain subscribers, are forced to pay for carriage on many systems, and are years from breaking even, let alone registering a profit. It is wholly arbitrary that a rule designed to spare new networks "the additional costs of captioning [that] could pose an economic burden that might deter entry" (*Report and Order* ¶ 154) would exclude existing startup networks from its purview.

GSN anticipates that the cost of closed captioning 75 percent of its library programming, as required by the *Report and Order*, will be approximately $18 million. GSN Comments at 3. Networks that experience immediate success may be able to afford such an expense after four years of operation. For others like GSN, however, the Commission's four-year period bears no rational relation to their ability to afford the cost of captioning.

A subscriber-based exemption does not suffer from this defect because it is based on viewer acceptance. By adopting a subscriber-based exception, the Commission will avoid imposing enormous costs on startup cable networks based on an arbitrary deadline that bears no relationship to the ability of a network to shoulder the additional expense of captioning.

B. Alternatively, The Commission Should Revise Its Four-Year Exemption To Reflect The Unique Impact Of Its Captioning Requirements On New Networks.

1. The Four-Year Exemption Should Run From The Effective Date Of The Regulations.

As discussed above, the four-year exemption period is an irrational method of assessing the financial strength of a new network because it bears no relationship to a network's financial condition. Such irrational methodology provides no regulatory basis for assisting either those who desire closed captioning or the industry. Moreover, in the *Report and Order,* the Commission states that a new network's exemption period will be calculated from the launch date of the network. *Report and Order* ¶ 154. Assuming the Commission retains the four-year exemption on reconsideration, despite the arguments that suggest it is not a good basis upon which to rest this policy, then GSN urges the Commission to begin the exemption period for existing startup networks from the effective date of the regulations. By doing so, the Commission will allow new networks launched before January 1, 1998 to have the same amount of time to adjust to the closed captioning requirements as their subsequently launched brethren.

As the Commission noted in its *Report and Order*, many startup networks have incurred substantial costs in acquiring programming without anticipating the added expense of the Commission's closed captioning requirements. *Report and Order* ¶ 150. *See also* GSN Reply at 4. In her separate statement accompanying the *Report and Order*, Commissioner Chong echoed this point:

> I am concerned that an overly stringent pre-rule programming captioning requirement may inadvertently have the effect of discouraging new cable networks whose business plan relied on this older programming.[6]

[6] *Report and Order*, Separate Statement of Commissioner Rachelle B. Chong ("Chong Statement") at 2.

Additionally, as noted above, these new networks are generally spending significant amounts of money on startup costs with little revenue in return. Allowing startup networks additional time to adjust to the Commission's rules will reflect the tenuous financial position of these networks *vis a vis* their more established competitors, and provide them vital time to adjust to the captioning requirements.

2. The Captioning Requirements Should Be Tolled For New Networks During The Four-Year Exemption Period.

According to the *Report and Order*, existing networks receive eight years to adjust to the Commission's captioning requirements regarding new programming, and ten years to transition for pre-rule programming. *Report and Order* ¶ 41. Under the new network exemption as adopted, however, startups like GSN receive **no** transition period after their exemption ends. Rather, following their exemption period, new networks are subjected to the closed captioning requirements **as they stand at that time**. *Report and Order* ¶ 154 ("A network must comply with the closed captioning rules once its exemption expires. A network will be able to prepare for the required amount of programming during the period in which it is exempt, and we do not believe that meeting the required levels of captioning will be an economic burden at that time."). Assuming the Commission retains the new network exemption in its current form, this policy will unfairly burden startup networks and should be revised to allow new networks the same amount of transition time as their more established counterparts.

Under the *Report and Order*, existing networks undergo several stages of closed captioning requirements for **new** programming over eight years. *Report and Order* ¶ 41.

Those requirements apply as follows:

- no reduction of closed captioned programming until 2000;
- 450 hours of captioned programming each quarter between January 1, 2000 and December 31, 2001;
- 900 hours between January 1, 2002 and December 31, 2003;
- 1350 hours between January 1, 2004 and December 31, 2005; and
- 95 percent of all programming as of January 1, 2006.

Id. ¶ 45. Existing networks also receive ten years to caption 75 percent of their pre-rule programs. *Id.* ¶ 61.

Following their emergence from the four-year exemption period, newly launched networks should receive the same amount of transition time as their older competitors. If the closed captioning requirements are not tolled for such networks during their exemption period, these networks will emerge from their exemption and immediately be expected to achieve closed captioning standards that the Commission allowed older networks years to attain.

For example, under the Commission's current rules, GSN will have only until 2008 – or six years from the expiration of its exemption – to caption 75 percent of its library programming. The older networks, however, receive 10 years to caption their pre-rule programs.

But the situation is particularly unfair with respect to new programming. Assuming GSN's exemption begins from the enactment date of the closed captioning regulations, (as urged herein) the network will become subject to the new network requirements on January 1, 2002. At that point, if the transition period is not tolled, GSN will immediately have to caption at least 900 hours of its new programming each quarter, or 3600 hours per year.

As explained earlier, however, GSN relies heavily on library programming. In a recent presentation, GSN informed the Commission that it currently has only 1100 hours of new programming per year. GSN *Ex Parte* Presentation at 2. Because of this emphasis on older programming, GSN -- even if it **triples** its new programming by 2002 – will be forced to caption virtually 100 percent of its new programming.

Unless the Commission tolls its new programming transition period for new networks, its captioning rules will have two unintended consequences. First, new networks will have to caption virtually all their new programming while older networks caption a lesser amount on a percentage basis. Second, because of the cost of captioning new programming, the rule creates an incentive for startup networks to avoid airing such programs in favor of older shows.[7]

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[7] This is also a consequence of the Commission's shift from a percentage-based rule in its NPRM for post-rule programming to one based on a required number of captioned hours. Thus, GSN also encourages the Commission to reconsider this aspect of its decision. In its NPRM, the Commission required programmers to caption their new programming on a percentage basis. Notice of Proposed Rulemaking, *In the Matter of Closed Captioning and Video Description of Video Programming,* MM Docket No. 95-176, ¶ 41 (rel. Jan. 17, 1997). *("NPRM")* Although all networks would have been required to caption the same percentage of new programming, established networks with large amounts of new programming would be required to caption a larger absolute number of program hours than their smaller competitors that programmed mainly older shows. This arrangement was fair because it reflected the relative financial condition of the older networks versus their smaller competitors.

In its *Report and Order*, however, the Commission adopted the above series of absolute-number-based captioning requirements. *Report and Order* ¶ 41. The *Report and Order* contains no explanation for its rejection of a percentage-based system, a change that unfairly penalizes new networks, which have relatively fewer hours of new programming. Under the current rule, such networks will bear the burden of captioning virtually all their new programming immediately upon emerging from the four-year exemption period, while older networks that produce large amounts of new programs will have to caption a smaller percentage over several years.

If the closed captioning requirements are tolled during GSN's exemption period, however, GSN will have until 2004 before it is required to caption any of its new programming. The network would be required to provide no more than 450 hours of captioned new programming each quarter in 2004-05, 900 hours in 2006-07, 1350 hours in 2009, and 95 percent of its new programming by 2010. The network also would have until 2012 to caption 75 percent of its pre-rule (1998) programming.

By structuring its rules in this manner, the Commission will be treating new and old networks equitably. Once new networks become subject to the Commission's captioning requirements, they will receive the same amount of time granted to their more-established competitors. Imposing the existing requirements on new networks, however, could severely disrupt those networks just as they are emerging from the Commission's four-year exemption period.

C. The Commission Should Raise Its Revenue Exemption Requirements To Reflect The High Costs Of Startup National Networks.

The *Report and Order* exempts from its captioning requirements video programmers with annual gross revenues below $3 million. *Report and Order* ¶ 164. It also states that no video programming provider shall be required to spend more than 2 percent of its annual gross revenues on captioning. *Id.* The Commission asserted that these exemptions would protect "small providers that are not in a position to devote significant resources towards captioning (i.e., those who would find it economically burdensome) and who would, even if they expended 2% of their revenues on captioning, provide approximately 2 hours a week, a minimal amount of captioned programming at $500 an hour captioning cost." *Id.*

These exemptions are too limited, however, because they are based on a false assumption of profitability. The current revenue ceiling of $3 million does not reflect the costs associated with starting a national network. As noted above, it can cost over $100 million to start a new network like GSN. *See supra* at 7. With such high expenses, a startup network can have well over $3 million in revenue, yet be years away from breaking even, let alone earning a profit. For the same reasons, the 2 percent cap on spending does not treat national startup networks fairly.

GSN therefore recommends that the Commission raise its revenue threshold to at least $20 million and significantly lower its spending cap to reflect the financial realities of starting a new national network. By doing so, the Commission will allow startup networks like GSN the opportunity to become financially established before subjecting them to the closed captioning requirements.

II. THE COMMISSION SHOULD PHASE IN ITS CLOSED CAPTIONING REQUIREMENTS FOR PRE-RULE PROGRAMMING.

The Commission rejected calls to "phase in" its captioning requirements for pre-rule programming, presuming "that market forces will foster increased captioning of pre-rule programs over time, rather than leaving the bulk of such programming to be captioned at the end of the transition period." *Report and Order* ¶ 64. But the Commission appears to have overlooked the disparate impact of its pre-rule captioning requirements on new networks with large libraries of older programming.

With high costs elsewhere, new networks prefer older programming because such programs are -- as Commissioner Chong has described -- "relatively inexpensive and well-received by audiences." Chong Statement at 2. GSN, for example, uses its library of 50,000 vintage game shows for more than 90 percent of its programming. GSN Comments at 1.

Many existing startup networks purchased their pre-rule programming before Congress enacted its closed captioning requirements. *Report and Order* ¶ 54. Because of these requirements, however, the cost of these programs may increase substantially. As the *Report and Order* acknowledges, off-line captioning of prerecorded programming is estimated to cost between $800 and $2500 an hour. *Report and Order* ¶ 41. GSN estimates that – regardless of its number of viewers -- it will cost at least $18 million to caption its library of vintage game shows. GSN Reply at 5.

As a result of these factors, some startup networks may choose simply not to air certain pre-rule shows, rather than pay for their captioning. Other networks that would be wholly reliant on pre-rule programming might not come into existence at all. Both outcomes would be completely inconsistent with Congress' intent in enacting Section 713 in the first place: "In general, the Committee does not intend that the requirement for captioning should result in a previously produced programming [sic] not being aired due to the costs of the captions." H.R. 104-204 (hereinafter "House Report"), 104th Cong., 1st Sess. at 114. *See also* Chong Statement at 2 ("While encouraging us to 'maximize' captioning of this older programming, Congress also appeared concerned that pre-rule programming not be relegated to the dusty archives due to the cost of captioning.").

In its *Report and Order*, the Commission acknowledged these points,[8] but failed to address them. Instead, the Commission simply agreed to review its closed captioning requirements for pre-rule programs in four years. *Id.* ¶ 64.

The financial burden caused by the Commission's captioning requirements will be disproportionately felt by new networks because of their reliance on library programming. Captioning is a fixed cost, and does not vary with a network's reach. Thus, startup networks – those that can least afford it – will be forced to pay proportionately greater amounts for captioning of pre-rule programming than networks with larger viewership and more revenue.

Accordingly, GSN urges the Commission to reconsider its current policy and adopt a phased-in approach towards the captioning of pre-rule programming by new networks, in conjunction with the 20 million subscriber new network exemption discussed above. Once a new network becomes subject to the Commission's captioning requirements (whether after four years or at 20 million viewers), it should not be required to caption more than 2 percent of its pre-rule programming, plus an additional 2 percent for each year of its existence thereafter. Significantly viewed programs would also be required to be captioned. This solution will allow new networks to become established through the use of library programming without being hobbled by the Commission's captioning requirements, while making the most popular programs accessible as quickly as possible.

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[8] *See, e.g., id.* ¶ 63 ("many broadcast stations not affiliated with major networks rely on significant amounts of older programming"). *See also Report and Order* ¶ 54 (noting comments expressing concern that its captioning requirements would unfairly burden such networks).

III. THE COMMISSION SHOULD EXEMPT INTERACTIVE PROGRAMMING FROM ITS CLOSE CAPTIONING REQUIREMENTS.

GSN seeks reconsideration of the Commission's decision to reject the creation of a class exemption for interactive programming. *See Report and Order* ¶ 150. In the *Report and Order*, the Commission recounted comments by parties like GSN that certain types of text and graphics-heavy programming -- such as interactive, weather, home-shopping, and sports programs – would be obscured by closed captioning. *Id.* ¶¶ 128-36, 150. *See* GSN Comments at 9; GSN Reply at 2-3. The Commission found -- with respect only to sports, shopping and weather programming – that although such programs "may well be more accessible without captioning than are programs that rely more heavily on the spoken word alone, with respect to each of these program types critical portions of the information conveyed is lost if captioning is absent." *Report and Order* ¶ 150. The Commission did not mention interactive programming specifically or the effect of captioning on the viewability of such programs. With respect to situations where captioning obstructed the viewing of a program, the Commission noted that users of closed captioning could simply "turn off the captioning when they find that captions interfere with other textual or graphical material." *Id.*

As an initial matter, it is illogical for the Commission to require programmers to pay for closed captioning that it concedes "may well be more accessible without captioning," then advise hearing-impaired viewers to "turn off the captioning" if it interferes with their viewing. This begs the question – if the captioning hinders, rather than increases, accessibility, then why require it in the first place?

Moreover, the *Report and Order* completely fails to address GSN's unique difficulties with closed captioning its interactive programming. As noted above, the Commission recounted GSN's difficulties in incorporating closed captioning into its interactive programming:

> Similarly, GSN asserts that its interactive and virtual environment game shows are logically unsuited for captioning. GSN maintains that the game components of its live, interactive games fill most or all of the screen, such that it would be impossible to display captions for these games without blocking one or more of the components. GSN further contends that these programs are transmitted live, with players participating by telephone, and the three-second delay inherent in real-time captioning would prevent viewers with hearing impairments from participating in these games in any event.
>
> -- *Id.* ¶ 135.

In support of its assertions, GSN provided the Commission with displays of one of its interactive programs and the obstructions that would be caused on the screen by closed captioning. *See* GSN Reply, Attachment A.

But the Commission never addressed GSN's comments or its presentation. Instead, the *Report and Order* appeared to lump together interactive programming with weather, sports, and shopping programs. *Id.* ¶ 150. With regard to such programming, the Commission stated that "critical portions of the information conveyed is lost if captioning is absent." *Id.* But the Commission made no such finding – nor is there any evidence in the record to support such a finding – regarding interactive programming. Indeed, as GSN stated in its comments, interactive programming will be uniquely harmed by the Commission's closed captioning requirements. Closed captioning will not only **fail to increase** access of hearing-impaired persons to interactive programming, but could actually **decrease** such access by compromising the basic premise of the shows themselves – live interaction.

As the Commission recognized in its NPRM, "[c]aptions should not interfere with the viewability of the video portion of the program." *NPRM* ¶ 111. Accordingly, the Commission should exempt interactive programming from its closed captioning requirements where such captioning would substantially interfere with the viewability of such programming. By recognizing the special status of interactive programming, the Commission will be acting consistently with Congress's intent that the "style and standards [of closed captioning] . . . are appropriate for the particular type of programming." House Report at 114.

CONCLUSION

For the foregoing reasons, GSN urges the Commission to reconsider its closed captioning requirements.

Respectfully submitted,

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Dated: October 16, 1997

CERTIFICATE OF SERVICE

I, Sharon Agranov, do hereby certify that copies of the Petition of Game Show Network, L.P. for Reconsideration has been served on the parties listed below via hand delivery on this 16th day of October, 1997.

Sharon Agranov

Sharon Agranov

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